the share of the net profits of defendants 1 and 4 in satisfaction of the decree and the share of the net profits appertaining to the deceased father of defendants 5 to 7 to the guardian of defendants 5 to 7.

A.S.V.

ORIGINAL CIVIL.

Before Mr. Justice Wadsworth.

GANGAMMA ALIAS CHINNAKEMPAMMAL, PLAINTIFF, 1937, October 21.

v.

CUDDAPAH KUPPAMMAL AND FOUR OTHERS, DEFENDANTS.*

Hindu law—Dancing girl—Devadasi—Adoption of daughters by, based on custom and not on religious benefit—Adoption without ceremonies—Validity of—Adoption by a unilateral act, without giving and taking—Validity of—Adoption of two daughters—Validity of—Adoption for purposes of prostitution—Invalidity of—Joint family composed of mother and daughter in that community—Coparcenary between—Non-existence of—Right of daughter to inherit her mother's property based on custom or contract and not on status—Non-existence of right by birth of daughters in that community.

In a suit by an alleged adopted daughter against her adoptive mother, who was a dancing girl by caste and profession, and others, claiming a share of immovable property, jewels and cash on the basis that she and her adoptive mother constituted a joint family possessed of property in which she was entitled to claim a share on partition,

held: (i) The practice of adoption amongst devadasis has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of this class to have a daughter to look after them in their old age and receive

* Civil Suit No. 407 of 1934.

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their property on their death. There is no text of Hindu law which recognizes the acquisition by birth by the daughter of a dancing girl of a right in the ancestral property of her mother. The right to a share can only be the creature of a custom or contract, express or implied, and not the result of status.

(ii) Though it is well established in Madras that an adopted daughter of a dancing girl of the devadasi community inherits to her adoptive mother, the property passing from mother to daughter, yet there is no such thing as a coparcenary strictly speaking between a mother and her daughter in the devadasi community.

Sudarsanam Maistri v. *Narasimhulu Maistri*(1) referred to.

Chalakonda Alasani v. *Chalakonda Ratnachalam*(2), *Kamakshi* v. *Nagarathnam*(3) and *Kokilambal* v. *Sundarammal*(4) distinguished.

(iii) There is no legal objection to the adoption of two daughters by a dancing girl provided such a practice is sanctioned by the custom of the community.

(iv) The adoption of a daughter by a dancing girl for purposes of prostitution is invalid and would not create any status in the adoptee.

K. K. Sridharan for plaintiff.

T. G. Raghavachari for first defendant.

P. Srinivasa Ayyangar for second defendant.

N. K. Kumaraswami for third defendant.

S. P. Duraiswami for *S. Ramanujachari* and *K. C. Duraiswami* for other defendants.

Cur. adv. vult.

JUDGMENT.

The plaintiff sues as the adopted daughter of the first defendant, who is a dancing girl by caste and profession, claiming a share in immovable property, jewels and cash on the basis that she and her adoptive mother constituted a joint

(1) (1901) I.L.R. 25 Mad. 149, 154.
(2) (1864) 2 M.H.C.R. 56.
(3) (1870) 5 M.H.C.R. 161.
(4) (1924) 21 L.W. 259.

family possessed of property in which she is entitled to claim a share by partition. The plaint is drafted just as if it were an ordinary partition suit under the Hindu law, and there is even an allegation that the sale of one item of property to defendants 4 and 5 is not for family necessity but for immoral purposes and not binding on the plaintiff. Throughout the plaint it is assumed that the adopted daughter of a devadasi living jointly with her mother has a right to claim partition, the suit not being expressly based on any plea of special custom or contract to that effect. Defendants 2 and 3 are impleaded on the ground that they have joined in the sale deed in favour of the fourth defendant and because the first defendant alleged that the second defendant was a member of the joint family. The third defendant is the daughter of the second defendant and defendants 4 and 5 are stranger-purchasers of one item of property. The questions arising in this suit relate to the fact and validity of the plaintiff's adoption, the existence of a joint family, the right of the plaintiff by virtue of the adoption or by virtue of the existence of a joint family to claim partition, the contribution by the plaintiff of her earnings to the family funds, and the legality of a claim based on the contribution of moneys, presumably the result of immoral earnings. There are also the usual contentions regarding the alienation of a house to defendants 4 and 5. I will deal firstly with the question of fact.

The first defendant is an elderly woman who admittedly had practised the calling of a dancing girl in her youth. It is well established that she adopted the second defendant many years ago.

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The documents relating to the dedication of the second defendant are not available, but there is no doubt that she was dedicated to a temple by her adoptive mother. The first defendant in 1917 (Exhibit IV) applied to a Fund for a mortgage, giving a genealogical tree in which she shows the second defendant as her daughter. There was also a similar application in 1924 (Exhibit V), after the plaintiff had come to live with the first defendant, to which also she appended another genealogical tree showing the second defendant as a daughter and the third defendant as a granddaughter and ignoring the plaintiff. The plaintiff herself was born a Vanniya. Her parents died in her infancy and she was in the custody of her brother-in-law, third witness for the plaintiff, Rangaswami Nayakar. There is considerable diversity of evidence as to how she came to live with the first defendant. It is common ground that she did join the first defendant when she was six or seven years old. She herself has no recollection of the alleged adoption. Her brother-in-law, the third witness for the plaintiff, states that he was a poor man and found difficulty in maintaining the plaintiff after her mother died, that Rajammal (the second witness for the defendant, the wife of the first defendant's brother and a native of Tirupporur where plaintiff's third witness lives) approached him on behalf of the first defendant and he agreed to give the plaintiff in adoption to the first defendant, that there was a feast to which the members of his community were invited and that on that occasion the first defendant and defendant's second witness came and took the plaintiff. He also states that the first defendant

had previously approached the plaintiff's mother during her lifetime with a view to the adoption and that the latter had agreed to it.

I have no hesitation in finding that this story of the circumstances in which the plaintiff went to live with the first defendant is not the whole truth. The most significant fact is the existence of a document (Exhibit VIII), dated 29th December 1922, admittedly executed by the third witness for the plaintiff and his wife, which recites that the plaintiff has been given by them to one Chinnappa Nayakar, who is authorised to maintain the plaintiff and to arrange for her marriage after she attained puberty or dedicate her to a temple in accordance with custom. This Chinnappa Nayakar is dead. He is alleged to have been a relative of the third witness for the plaintiff and also a relative of the second witness for the defendant. This is difficult to believe, for the former is a Vanniya while the latter, though she married into the dancing girl caste, is by birth a Balija. The latter herself says that she first saw the plaintiff in the house of this Chinnappa Nayakar who told her that the child had been left with him by the former owing to his poverty. According to the latter, the child wanted to go to Madras and she took her without any formal transfer of guardianship and the child lived for a while with the latter in the ground-floor of the house, the upper storey of which was occupied by the first defendant. There, she made friends with the first defendant's granddaughter, the third defendant, a child of the same age, and gradually she came to live upstairs with the first defendant instead of downstairs with

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the latter. It seems to me that this evidence is probably much more true than the story of the former that he himself, in pursuance of the wishes of the plaintiff's mother, formally gave the child in adoption to the first defendant.

It is of course well settled that no particular ceremony is necessary for an adoption by a devadasi. There is therefore not the legal necessity for a giving and taking such as is required to constitute a valid adoption of a boy under the ordinary Hindu law. When dealing with the adoption of a girl by a devadasi all that need be proved is the fact of adoption by the adoptive mother, which may be by a unilateral act. We have good evidence that the plaintiff was taken into the family of the first defendant in her childhood and brought up along with the first defendant's grand-daughter. The genealogical tree in Exhibit V appears to indicate that up to 1924, at any rate, no formal decision had been made by the first defendant to adopt the plaintiff. The first defendant did, however, give to the plaintiff the sort of education which a woman of the dancing girl community ordinarily gives to a daughter. She was taught to dance and at a comparatively early age she gave performances in public. The only documentary evidence indicating an actual adoption is comprised in two documents connected with the dedication of the plaintiff to the temple as a dancing girl. This dedication of the plaintiff took place in 1931 and the documents concerned are a doctor's certificate dated 27th May 1931 in which the plaintiff is described as the daughter of the first defendant, aged 17, and a Magistrate's certificate dated

16th June 1931 in which the plaintiff is described as the daughter of the first defendant and is alleged to have stated that she is hereditarily connected with the devadasi community. According to the plaintiff these statements are based on information supplied by the first defendant to the officials concerned. According to the first defendant, the statements are based on information supplied by the plaintiff herself. It is admitted that the first defendant accompanied the plaintiff when these certificates were obtained and that she did dedicate the plaintiff to the temple of which the second witness for the plaintiff, Raghava Bhattachari, is the archaka and it is he who produces these documents. These facts, if they stood alone, would raise a strong presumption that the first defendant had actually adopted the plaintiff as her daughter; but there are other circumstances tending to rebut this presumption and to confirm the inference which arises from the genealogical trees appended to Exhibits IV and V. The plaintiff after her dedication was taken by the first defendant to Karaikudi. According to the first defendant and the second witness for the defendants this was merely a short visit connected with the illness of a relation but according to the plaintiff she was taken there in order that she might earn large sums by dancing and prostitution and she would say that she was there for nearly two years. Probably the truth lies between the two stories. The situation of Karaikudi in close proximity to the Chettinad provides great facilities for the profitable exercise of the plaintiff's profession and it seems to me probable that she did practise her trade there,

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though I am quite unable to believe her evidence that she earned Rs. 10,000 during this visit. She is probably exaggerating the duration of her visit and almost certainly she has grossly exaggerated the amount of her earnings.

[His Lordship discussed the evidence and proceeded:]

Every other circumstance in the case points to the conclusion that the plaintiff was an orphan girl not adopted but fostered and trained merely that she might be exploited as a prostitute and, in view of the palpably false nature of the evidence of the third witness for the plaintiff, which is the positive evidence of the act of adoption, I must hold that the story of adoption is untrue.

This finding is of itself sufficient to conclude the case, for it seems to me apparent that, unless the case is somehow based on a family relationship, it can be nothing more than a claim for an account of the profits of organised prostitution, which the Courts would not entertain. But it is desirable, in view of the possibility that the case may be taken further, that I should discuss the legal aspects of this case which have been argued very fully before me. For the purpose of this discussion I will assume that my finding regarding the adoption is erroneous and that the plaintiff was in fact the adopted daughter of the first defendant. Assuming so much, can the plaintiff claim a share in her mother's property merely on the ground that she and her mother were living jointly and that her earnings were handed over to her mother? There is in my opinion no reliable evidence that the plaintiff's earnings contributed

substantially to the acquisition of the immovable properties in which a share is claimed ; and, seeing that the plaintiff was allowed to remove all the jewels which she claimed as her own, it is not very likely that anything in which she has an interest was left in the possession of the first defendant, unless it can be said that the plaintiff has, whether by status, custom or contract, a right to claim a partition of the joint family property.

It is well established in Madras at any rate that the adopted daughter of a dancing girl of the devadasi community inherits to her adoptive mother, the property passing from mother to daughter. The plaintiff's claim, however, is based either on the existence of a coparcenary similar to that which the Hindu law recognises amongst men of ordinary castes, or at least on the existence of some custom or contract whereby the property of the family of these women is treated as if it were joint family property divisible amongst the members thereof. I may say at once that there is no specific pleading of any custom or contract. The plaint appears to proceed on the basis of the acquisition by the plaintiff of a status as an adopted daughter which gives her a right automatically to claim partition. There is, it is true, an averment that the plaintiff has contributed substantially to the acquisition of the properties which she claims, but the plaint does not proceed on the basis of a claim for either a return of her contributions or a share proportionate to those contributions. Essentially the claim is one based on the existence of a joint family in which the plaintiff has a share by her status as a member of that family.

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It seems to me doubtful whether such a thing as a coparcenary strictly speaking can be said to exist between mother and daughter in the devadasi community. The essence of a coparcenary consists in the acquisition of rights in property by birth, rights which are a creature of the law, based on the theory of religious benefit and incapable of being created by act of parties otherwise than by adoption; vide *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1). Can it be said that the law has created a coparcenary between a mother and a daughter in the devadasi community? I do not think it can. Nor do I think it can be said that there is any custom having the force of law which has ever been recognised by the Courts as establishing the existence of a true coparcenary amongst the female members of this community. There are three reported cases which come near to the recognition of such a coparcenary. The first is a very old case, *Chalakonda Alasani* v. *Chalakonda Ratnachalam*(2). That was a case in which the plaintiff claimed the jewels, etc., in the possession of her daughter and grand-daughter on the ground that they were the result of joint earnings and that she, as the senior member of the joint family, had the right to hold those properties. The defence was that they were the self-acquisitions of the daughter and the grand-daughter. No other objection was raised and no claim for partition was considered. The lower Court held that these properties represented the gains of learning and were the self-acquisitions of the defendants, and on appeal, it was held that they

(1) (1901) I.L.R. 25 Mad. 149, 154. (2) (1864) 2 M.H.C.R. 56.

were joint properties and that the plaintiff, the senior member of the joint family, had the right to their custody. In this case it was assumed that the rules applicable in a Hindu coparcenary to the custody of the properties and the separate ownership of self-acquisitions, applied in the case of the female members of the devadasi caste living jointly. But there was no real consideration of the question whether such a female member acquires a right by birth or can claim during the lifetime of her mother a partition as against her. In *Kamakshi* v. *Nagarathnam*(1) the plaintiff sued to establish her right as a coparcener with her deceased mother's sister to a share in a heriditary dancing girl office. It was held that in this community a daughter must be regarded as a son and must take an estate of inheritance from her mother and that the first defendant did not as a coparcener acquire the right of succession to her deceased sister to the exclusion of the latter's daughter. Here again, there appears to have been no consideration of the question whether any true coparcenary exists in which a daughter acquires a right by birth. All that is decided is that, as between two sisters, the joint right of one does not pass on her death to the other but to the daughter of the deceased. Besides these two old cases, there is a modern case which appears to recognise the existence of a coparcenary between the female members of a dancing girl's family, viz., the decision of KUMARASWAMI SASTRI J. in *Kokilambal* v. *Sundarammal*(2). That was really a case in which the mother and daughters joined together in an attempt to defeat an alienee by

(1) (1870) 5 M.H.C.R. 161. (2) (1924) 21 L.W. 259.

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asserting that the property alienated formed part of the joint family property, that the alienation was not binding on the joint family and that the property was liable to be partitioned. The learned Judge recognised the existence of joint family property as between the mother and daughters, held that the alienation was binding only in part and directed a partition. Referring to the old cases which I have just quoted, he holds it established that there can be a coparcenary of dancing girls with rights of survivorship but remarks that there is no case which goes to the length of saying that daughters of dancing girls acquire by birth an interest in the ancestral property. He leaves this question open and decides the case on the basis that the mother and daughter and grand-daughter were in fact living together as members of a joint family, pooling their earnings and meeting their expenses out of the joint funds and treating the property as coparcenary property, so that it became coparcenary property by conduct. With very great respect to this distinguished and learned Judge, it seems to me that in this decision the term "coparcenary" is used in a somewhat unprecise manner. If we restrict the term to its ordinary connotation of the relationship created by law, the basis of which is religious and the essence of which is the acquisition of an interest by a coparcener by birth or by adoption, I do not see how it can be said that any such thing as a coparcenary exists amongst the females of the dancing girl community. As has been observed by SADASIVA AYYAR J. in *Guddati Reddi Obala*

v. *Ganapati Kandanna*(1), no spiritual benefit can accrue to a prostitute mother by the spiritual ministrations of her prostitute adopted daughter. It seems to me quite clear that the practice of adoption amongst devadasis has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of this class to have a daughter to look after them in their old age and receive their property on their death. There is, so far as I am aware, no text of Hindu law which recognises the acquisition by birth by the daughter of a dancing girl of a right in the ancestral property of her mother and it seems to me apparent that, if the joint ownership of the family property is to be spelt out of the conduct of the members of the family, no question of the acquisition of a right by birth can arise and that the right to a share must really be the creature of a contract, express or implied, and not the result of status. It might of course be argued that there is a universal and legally binding custom in the community that daughters should have a right to claim partition against their mother. But such a custom would have to be asserted and proved and certainly cannot be inferred by a mere analogy with the special rules of Hindu law, based on religion and on the texts, regarding coparcenary relationships amongst men. Actually, however, the decision of KUMARASWAMI SASTRI J. in the case referred to is not based on the assumption of any true coparcenary relationship between the mother and the daughters. It is expressly based on conduct from which can be implied a family arrangement

(1) (1912) 23 M.L.J. 493.

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that the property should be treated as if it were ordinary Hindu joint family property; i.e., the decision is based on an implied contract, and I do not think it can be treated as an authority for the contention that any dancing girl living jointly with her mother can claim as against her mother a partition of the family property merely on the basis of their joint living and the absence of any indication of separation in food or status. I am fortified in this view by indications in other decisions. One of the cases quoted by KUMARASWAMI SASTRI J. himself is *Boologam* v. *Swornam*(1) in which it was held that property acquired by two dancing girls, sisters, from the earnings of prostitution was the self-acquired property of the two sisters which they held as co-owners and in which the other members of their family had no rights. I have examined the original judgment from which this appellate decision arises and I find that the trial Judge held that the property in question was in fact acquired out of the joint assets of the family but that there was no law or custom by which a dancing girl could compel partition of the family property. The reported appellate decision proceeds on a different finding of fact and it has not considered the question whether a right to demand partition exists. There is a Bombay case, *Mathura Naikin* v. *Esu Naikin*(2), in which it was held that the Madras view recognising the validity of an adoption by a prostitute could not be accepted in Bombay and it is remarked at page 572 that, even if a right of inheritance were recognised, that is distinct from a right to call for partition and that

(1) (1881) I.L.R. 4 Mad. 330. (2) (1880) I.L.R. 4 Bom. 545.

such a right could not be based on the analogy of the position of an ordinary daughter-heir, nor could it be based on the analogy of the position of an adopted son whose right accrues by the fact of adoption just as the right of a natural-born son accrues by birth. It seems to me that this reasoning is sound. The right to claim partition may be based on contract, or law, or on custom having the force of law. If it is based on contract, the contract must be asserted and proved, as it certainly has not been in the present case. If the right is a creature of the law, authority must be found for it either in the ancient texts or in the statutes or in the body of law expounded and affirmed in the reported decisions of the Indian Courts. I can find no such basis for the right as claimed by the plaintiff. If it is based on custom, here again there must be a specific plea of such a custom and evidence in support of it. The evidence must satisfy the usual requirements for the proof of a customary right ; it must be ancient, certain, notorious and continuous. There is no such averment and no such evidence in the present case. I find therefore that, even assuming that the plaintiff's adoption be good, no basis has been established for a right to claim partition as a member of the joint family.

I have already indicated that, in my opinion, no suit would lie for an account or a share in the profits of an immoral and illegal partnership. It seems to me unnecessary to go in detail into the further question whether the adoption of the plaintiff by the first defendant is itself an illegal adoption by virtue of which no claim could be preferred. There is no legal objection to the

adoption of two daughters by a dancing girl provided that such a practice is sanctioned by the custom of the community as it appears to be in this case. On my findings of fact it must be taken as established that the plaintiff was taken when a minor into the first defendant's household in circumstances which justify the inference that she was taken with a view to being trained as a prostitute, i.e., the first defendant obtained possession of her in such circumstances as would constitute an offence under section 373 of the Indian Penal Code. Such an adoption, being prohibited by law, cannot give rise to a status which would form the basis of legal rights. As was observed by a Bench of this Court in *Kandaiya Pillai* v. *Chokkammal*(1), such an adoption is prohibited by law though the law recognises the possibility of adoption by a dancing girl when the purpose is not prostitution. But, as the learned Judges say, the adoption of a minor for the purpose of prostitution is not really an adoption at all; it is a mere use of certain forms which, when gone through by persons with an untainted purpose, would result in an adoption; as actually gone through, they result in nothing and affect the status of no one. On the basis of this reasoning, it would follow that, even if the first defendant had intended to adopt the plaintiff, it being shown that the adoption is one which offends against the law as laid down in section 373 of the Indian Penal Code, that adoption is invalid and confers no status upon the plaintiff, nor can there be any question of an estoppel against the provisions of a statute.

(1) (1920) 59 I.C. 214; 12 L.W. 7.

Turning to the issues in the case, I must hold on the first issue that the adoption set out in the plaint is not true and, even if true, would not be valid ; on the second issue that there is no joint family properly speaking and that the plaintiff has no claim to partition ; on the third issue that there is no proof that any of the properties in which the plaintiff claims a share were acquired out of her earnings ; and on the fourth issue, even if it were proved that the plaintiff's immoral earnings contributed to the acquisition of the properties claimed, that a suit based on such an immoral association would not lie. No decision seems necessary on the fifth issue. On issues 6, 7 and 8 I find that the plaintiff cannot question the alienation in favour of defendants 4 and 5. In the result, the suit is dismissed with costs, one set for defendants 1 and 2 and one set for defendants 4 and 5. The plaintiff will pay the court-fee due to Government.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn.

IN RE KANNEGANTI CHOWDARAYYA (ACCUSED), APPELLANT.*

1938, February 22.

Indian Penal Code (XLV of 1860), sec. 361—Hindu boy—Mother's custody from birth—Acquiescence by father—Later, father enticing away the child—If an offence.

A boy born of Hindu parents had been brought up by his mother and was in her keeping from the date of his birth. The

* Criminal Appeals Nos. 456 and 465 of 1937.